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LEE THYE

v.

DANIEL SIEW YONG LOONG

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HIGH COURT MALAYA, SHAH ALAM
SURAYA OTHMAN J
[SUIT NO: MT2-22-580-2008]
15 JULY 2013

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TORT: *Defamation - Libel - Letters containing defamatory material written by solicitors to each other on respective client's instructions - Whether protected by qualified privilege - Whether recipient of defamatory attack justified in counter-attacking accuser with equally defamatory remarks - Whether solicitor accused of writing defamatory letter merely performing legal duty on client's instructions - Whether solicitor's letter actuated by malice*

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A prime issue in the instant suit was whether letters containing defamatory material written by solicitors to each other on their respective client's instructions were protected by the defence of qualified privilege. The plaintiff and the defendant were lawyers; so was the defendant's client ('Madam Lee'). In a letter ('P1') to Madam Lee, the plaintiff's solicitor on his instructions made various serious allegations against Madam Lee. She engaged the defendant to write a reply letter ('P3') to the plaintiff's solicitor responding to the allegations made, and in doing so, used words defamatory of the plaintiff. In the instant suit, the plaintiff said the words defamatory of him were published to third parties, namely, the clerk in the plaintiff's solicitor's firm who had read the letter before she handed it over to the solicitor. The plaintiff claimed for RM2m in general damages and another RM2m in aggravated damages with interest and costs. The defendant submitted that he did not know the plaintiff until after the instant suit was filed; that P3 was written by him on an occasion of qualified privilege based on a solicitor-client relationship; that he was under a legal duty to comply with his client's instructions to write P3 and that the writing of that letter was not actuated by malice.

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Held (dismissing plaintiff's claim with costs):

(1) The defendant succeeded in raising the defence of qualified privilege. The offensive stance was started by the plaintiff himself in P1 when he attacked and made serious allegations against Madam Lee. She responded in self-defence by instructing the defendant to reply to the

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attack and in so doing, used words that defamed the plaintiff. Her action was legitimate and proportionate to the attack against her. She was justified in using the defamatory words. (paras 43, 46, 51 & 52)

(2) The defendant had proven that he was under a legal duty to comply with his client's instructions to write P3 to the plaintiff's solicitor to dispute the plaintiff's serious allegations against his client. The occasion was protected under the defence of qualified privilege based on a solicitor-client relationship. (para 45)

(3) P3 was not actuated by malice since the defendant and the plaintiff did not know each other until the suit was filed in court. The plaintiff failed to prove malice on the defendant's part. (paras 49 & 51)

Case(s) referred to:
Abdul Rahman Talib v. Seenivasagam & Anor [1966] 1 LNS 5 FC ***(refd)***
Adam v. Ward [1917] AC 309 ***(refd)***
Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***
Baker v. Carrick [1894] 1 QB 838 ***(refd)***
Hoe Thean Sun & Anor v. Lim Tee Keng [1999] 1 CLJ 187 HC ***(refd)***
Huth v. Huth [1915] 3 KB 32 ***(refd)***
Ismail Mohd Saaid & Anor v. DSP Hj Mohd Ali Bujang @ Mohd Bujang [2009] 1 LNS 886 HC ***(refd)***
Ismail Shamsudin v. Abdul Aziz Abdan [2007] 8 CLJ 65 HC ***(refd)***
Kian Lup Construction v. HongKong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***
Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar [2003] 4 CLJ 20 FC ***(refd)***
Morgan v. Odhams Press Ltd [1971] 1 WLR 1239 ***(refd)***
S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 1 LNS 146 HC ***(refd)***
Tjanting Handicraft Sdn Bhd & Anor v. Utusan Melayu (Malaysia) Sdn Bhd & Ors [2001] 3 CLJ 571 HC ***(refd)***
Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***
Watts v. Times Newspapers Ltd [1996] 2 WLR 427 ***(refd)***
Zainudin Muhammad v. NEC System Intergration Construction Ltd & Ors [2000] 1 LNS 205 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d)

Other source(s) referred to:
Keith R Evans, *Law of Defamation in Singapore and Malaysia*, 2nd edn, Butterworth, 1993, p 34
David Price LLB's, *Defamation Law, Procedure & Practice, Sweet & Maxwell*, 1997, p 88

For the plaintiff - Wong Yuen Hock; M/s Atma Singh Veriah & Co
For the defendant - Audrey Quah; M/s Shui-Tai

Reported by Ashok Kumar

JUDGMENT

Suraya Othman J:

Introduction

[1] The plaintiff claimed that the defendant had defamed him when the defendant through his firm, Messrs Siew, wrote a letter dated 22 November 2007, P3, containing defamatory words about the plaintiff to the plaintiff's solicitor, Messrs Atma Singh Veriah & Co. The plaintiff claimed that the words in the letter in its ordinary meaning, among others, mean that the plaintiff, as an advocate and solicitor, is unprofessional, unethical, dishonest, a cheat and has committed criminal breach of trust. The plaintiff then filed this suit against the defendant claiming for general damages in the sum of RM2,000,000; aggravated damages in the sum of RM2,000,000; interest on the damages at the rate of 4% from 4 December 2007; interest on the judgment sum at the rate of 8% from the date of judgment to the date of realisation and costs of this action.

Brief Facts

[2] The plaintiff is an advocate and solicitor of the High Court of Malaya since July 1971 practising under the name and style of ST Lee & Partners and residing at No. 18, Jalan Midah 14, Taman Midah, Cheras, 56000 Kuala Lumpur.

[3] The defendant is also an advocate and solicitor of the High Court of Malaya practising under the name and style of Siew at No. 49, Jalan Muhibbah, Taman Muhibbah, 43980 Sungai Pelek, Selangor Darul Ehsan.

[4] Messrs Atma Singh Veriah & Co were at the material time acting for the plaintiff (SP1) as his solicitor.

[5] Messrs Siew was at the material time acting for Madam Lee Fong Ling, (SD2), as her solicitor. Madam Lee Fong Ling is also a solicitor of the High Court of Malaya practising under the name and style of FL Lee & Co at No. 568, 3 1/2 Miles, Jalan Ipoh 51200, Kuala Lumpur.

[6] On 13 November 2007, the plaintiff's solicitor Messrs Atma Singh Veriah & Co, upon instruction of the plaintiff, wrote a letter, P1, to Madam Lee Fong Ling (SD2), among others, alleging that Madam Lee Fong Ling has committed misrepresentation and had colluded with her father Mr Lee Shin Kuang @ Lee Sen Bin to defraud the plaintiff. The letter gave Madam Lee Fong Ling seven days to give a satisfactory explanation failing which the plaintiff will lodge a complaint to the Bar Council on Madam Lee Fong Ling's misconduct.

[7] On 16 November 2007 the defendant through his firm, Messrs Siew wrote a letter, (P2), addressed to Messrs Atma Singh Veriah & Co replying that he is taking instruction from Madam Lee Fong Ling (SD2) with regards to the allegations made by the plaintiff in the letter, P1, and will respond on the allegations on or before 23 November 2007.

[8] On 22 November 2007 the defendant through his firm Messrs Siew replied to the allegations made in P1. This letter by the defendant, P3, was addressed to the plaintiffs solicitor Messrs Atma Singh Veriah & Co. It is the contents of this letter, P3, which the plaintiff claimed to have defamed him.

[9] The alleged defamatory words in P3 are set out below:

> Further, your client's freshly concocted allegations of misrepresentation, fraud and/or misconduct against our client is a knee-jerk reaction towards a civil claim and/or demand and/or complaint by the said Lee Shin Kuang @ Lee See Bin (our client's father) against your client for breach of trust and/or fraud and/or misconduct, the facts of which are all well within your client's knowledge.

[10] The plaintiff then filed a defamation suit against the defendant claiming for general and aggravated damages, interest on the damages and costs.

Issues To Be Tried

[11] The issues to be tried are:

(a) Whether the words in P3 "Further, your client's freshly concocted allegations of misrepresentation, fraud and/or misconduct against our client is a knee-jerk reaction towards a civil claim and/or demand

and/or complaint by the said Lee Shin Kuang @ Lee Sen Bin (our client's father) against your client for breach of trust and/or fraud and/or misconduct, the facts of which are all well within your client's knowledge" were defamatory about the plaintiff and of him in his occupation as an advocate and solicitor.

(b) Whether the words referred to the plaintiff.

(c) Whether the words were published to third parties.

(d) Whether the letter, P3, was written by the defendant on an occasion of qualified privilege based on a solicitor-client relationship.

(e) Whether the defendant was under a duty, legal, moral and social to comply with the instructions of his client and to write P3 to the plaintiff's solicitor to dispute the plaintiffs allegation.

Decision Of The Court

[12] The plaintiff was represented by Mr Wong Yuen Hock and the defendant was represented by Miss Audrey Quah. Plaintiff called two witnesses, the plaintiff himself (SP1) and Puan Siti Kamsinah Mohamad (SP2) and the defendant called two witnesses, the defendant himself (SD1) and Madam Lee Fong Ling, (SD2).

The Law And Principles

[13] It is trite law that in order for the plaintiff to succeed in a claim for defamation, three ingredients need to be fulfilled. The three ingredients that need to be proved are:

(a) The words are defamatory;

(b) It concerns or refers to the plaintiff; and

(c) There was publication to third parties.

[14] This principle has long been enunciated in the case of *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321; [1989] 1 MLJ 315 where Mohd Dzaiddin J, (later Chief Justice), explained:

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published. Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express

malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged (*Rajagopal v. Rajam* [1972] 1 MLJ 45).

[15] The above principles had been followed and applied in the case of *Kian Lup Construction v. HongKong Bank Malaysia Bhd* [2002] 7 CLJ 32 by Ramly J, (as he then was), and in the case of *Ismail Shamsudin v. Abdul Aziz Abdan* [2007] 8 CLJ 65; [2007] 3 MLJ 512 by Low Hop Bing J, (as he then was).

Whether The Words In P3 Are Defamatory

[16] In the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393, His Lordship, Richard Malanjum J, (as he then was), said this:

The approach in the construction of the words complained of is to consider the meaning such words would convey to ordinary reasonable person using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extends to any reference or implication from which persons can reasonably draw (see *Jones v. Skelton* [1963] 3 All ER 952; *Kemsley v. Foot* [1952] 1 All ER 501; *Rajagopal v. Rajan* [1971] 1 LNS 117; [1972] 1 MLJ 45). It is irrelevant what the publisher intended the words complained of to mean (see *Capital & Counties Bank v. Henty* [1882] 7 App Cas 741; *Grubb v. Bristol United Press Ltd* [1963] 1 QB 309, *AJA Peter v. OG Nio & Ors* [1979] 1 LNS 1; [1980] 1 MLJ 226). It is also irrelevant what the readers understood the words complained of to mean for the purpose of deciding the ordinary and natural meaning. (See *JB Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139; [1985] 1 MLJ 334). There is no necessity for a Plaintiff to prove falsity of the words complained of once they are found to be defamatory of him (see *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2; [1965] 31 MLJ 142).

As to whether the words complained of in this case were capable of being, and were, in fact, defamatory of the Plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally (see JB Jeyaretnam).

[17] In the case of *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 56 Mohamed Azmi J, (as he then was), enunciated the test of what constitute a defamatory nature of a statement. At p. 58 (MLJ), His Lordship states:

Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words

A tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

[18] Therefore, in our instant case, what would an ordinary reasonable B person construe the words to mean or convey? Do the words complained of were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally? Do the words attack the plaintiff's moral character attributing C crime, dishonesty, misconduct and untrustworthiness in the discharge of his professional duties as an advocate and solicitor of the High Court of Malaya?

[19] The letter, P3, at the last second paragraph, alleged that the plaintiff had committed breach of trust, fraud and misconduct. These D words were calculated to expose the plaintiff to hatred, ridicule and contempt in the mind of a reasonable man or would tender to lower the plaintiff in the estimation of right thinking members of society generally. It is also an attack on the moral character of the plaintiff as an advocate and solicitor attributing crime, dishonesty, untruthfulness in the discharge E of his professional duties. As such, I find that the words are defamatory.

Whether The Words Concerns Or Refers To The Plaintiff

[20] In *Morgan v. Odhams Press Ltd* [1971] 1 WLR 1239, the court F states:

> It is always for the plaintiff to prove that the defamatory words were published of and concerning him. The onus is firmly upon him, and if he does not discharge it, he has no cause of action.

G **[21]** In *Tjanting Handicraft Sdn Bhd & Anor v. Utusan Melayu (Malaysia) Sdn Bhd & Ors* [2001] 3 CLJ 571 at p. 586, the court states:

> Identity of Party
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> In an action for slander of goods for libel it is not necessary that the H words should refer to the plaintiff by name, so long as the words would be understood by reasonable people to refer to the plaintiff. The court must be satisfied as to whether the libel designated the plaintiff in such a way as to let those who know him understand that he was the person referred to. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out

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that he is the person being referred to. This is what the Australian High Court meant when it said in *David Syme & Co & Anor v. Canavan* [1918] 25 CLR 234 at 238:

> The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not mean that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognized; and whether that description takes the form of a word picture ..., if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient.

[22] In our case today, the letter, P3, was written by the defendant in reply to the letter written by Mr Atma Singh Veriah, P1, and in P1 Mr Atma Singh Veriah has clearly stated that he acted under the instruction of Mr Lee Thye @ Lee Shan Too, the plaintiff, to write the letter, P1. Thus the identity of the person referred to in the letter P3 is undisputed, that is the plaintiff since P3 is in reply to P1. Further, the defendant in his evidence during cross-examination had admitted that the words complained of referred to the plaintiff. Thus the issue on identity is undisputed; that the words referred to the plaintiff.

Whether The Words Were Published To Third Parties

[23] In the case *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233) at p. 776 (p. 238), the court held that:

> In order to constitute publication, the defamation matter must be published to a third party, and not simply to the Plaintiff. By publication it is meant the making known of defamatory matter after it has been written to some person other than the person of whom it is written. The uttering of a libel to the party libelled is no publication for the purpose of civil action. (citing *Wennhak v. Morgan* [1888] 20 QBD 635).

[24] In the case of *Huth v. Huth* [1915] 3 KB 32 CA, comments in the course of judgment were made:

> Similarly there may be presumed publication of other types of materials sent in the post. Telegrams and postcards, by their very nature, would normally be seen by persons other than those to whom they are addressed, and it would be quite easy to demonstrate publication to third parties of defamatory allegations contained in such transmissions.

[25] In the book on the *"Law of Defamation in Singapore and Malaysia*, 2nd edn. by Keith R Evans, published by Butterworth, 1993, at p. 34, the writer states:

> Similarly there may be presumed publication of other types of materials sent in the post. Telegrams and postcards, by their very nature, would normally be seen by persons other than those to whom they are addressed, and it would be quite easy to demonstrate publication to third parties of defamatory allegations contained in such transmissions. Indeed, there is a legal presumption that these are published on being sent through the post without actual proof that anyone did in fact read them. The presumption is theoretically rebuttable, although it is very difficult to conceive the rebutting evidence to the effect that no one had read the document could be given.

[26] The letter P3 was sent through post. Thus there is the presumption that it has been published unless rebutted by the defendant. This, the defendant failed to do. Be that as it may, the clerk at the material time in Messrs Atma Singh Veriah & Co, Puan Siti Khamsinah Mohamad, SP2, confirmed that she was the clerk in charge of the case for the solicitor, Mr Atma Singh Veriah, and that it was her job to read any letters addressed to the firm before handing it over the solicitor in charge. SP2 gave evidence that she read P3 and this evidence is unchallenged. As such I find that there is publication of the defamatory words in P3 to third parties.

[27] Therefore, on a balance of probability, I am satisfied that the plaintiff has proven that the defendant has defamed him as all the three ingredients were fulfilled. Based on the cases of *S Pakianathan v. Jenni Ibrahim* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173 and *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 1 LNS 5; [1966] 2 MLJ 66, the burden is now shifted to the defendant to present his defences.

Defendant's Defence

[28] The defendant, through his counsel, Miss Audrey Quah, raised the defence of qualified privilege.

Qualified Privilege

[29] The defendant contends that the occasion on which the letter, P3 was written in reply to the letter written by the plaintiff, P1, was made without malice and was on an occasion of qualified privilege based on a solicitor-client relationship. The defendant argued that being a member of the legal profession, he has the duty either legal, social or moral to write the letter upon instruction of his client.

[30] The plaintiff contends that defendant's action of writing P3 clearly smacked of malice which in the circumstances would defeat the defendant's defence of qualified privilege. The plaintiff submitted that in order to establish a plea of qualified privilege there must be a common interest in the matter between the person issuing and the person receiving the communication, but in the instant case, there is no such common interest between the defendant as the issuer of the letter and Messrs Atma Veriah Singh & Co, who is acting for the plaintiff. Plaintiff referred to the case of *Ismail Mohd Saaid & Anor v. DSP Hj Mohd Ali Bujang @ Mohd Bujang* [2009] 1 LNS 886; [2010] 1 MLJ 414 in support of his contention.

[31] The defendant also submitted that the plaintiff had filed a suit against Madam Lee Fong Ling, SD2, which suit was dismissed by the court by a summary application under O. 18 r. 19(a), (b), (c), (d) of the Rules of the High Court 1980 and that the defendant had also made a similar application and it too was dismissed by the court.

[32] After hearing the submissions of both counsels, it is clear and not in dispute that the letter, P3, was written by the defendant as a solicitor on behalf of his client, Madam Lee Fong Ling, SD2, in reply to the letter P1 written by Mr Atma Singh Veriah acting on behalf of the plaintiff.

[33] The question here then, is whether letters written by solicitors acting on behalf of their respective clients are protected under the defence of qualified privilege; and

What is qualified privilege, and who bears the burden of proving it?

[34] In the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub (supra)* the court held:

> It is a settled law that it is for the defendants to prove the facts and circumstances which established the occasion as qualified privilege when the words complained of were published.

[35] In the case of *Adam v. Ward* [1917] AC 309, Lord Atkinson opined that:

> A privilege occasion is an occasion ... where the person who makes a communication has an interest or duty, legal, social or normal to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it; the reciprocity is essential.
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> It is essential for the defence of qualified privilege to succeed; to at least satisfy two criteria, i.e, one there is a legal, moral or social duty to make the statement on one side. The other is that there is a

A corresponding interest to receive it. However, if it is spiked with malice, the defence will not be available, (see *Rajagopal v. Rajan* [1971] 1 LNS 117).

[36] In the case of *Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar* [2003] 4 CLJ 20; [2003] 4 MLJ 345, it was held that
B communication between solicitors on behalf of their clients in the course of legal proceedings is privileged.

[37] In the case of *Zainudin Muhammad v. NEC System Intergration Construction Ltd & Ors* [2000] 1 LNS 205; [2000] 6 MLJ 763, it was
C decided that a solicitor had a legal duty to write letters for their client and in the absence of express malice, *ex facie*, these letters cannot in anyway be defamatory to the plaintiff. This case at p. 768 cited the case of *Baker v. Carrick* [1894] 1 QB 838 (CA) where the learned judge stated:

D In *Baker v. Carrick* [1984] 1 QB 838 (CA) a solicitor, acting on behalf of his client, gave written notice to an auctioneer not to part with the proceeds of the sale of certain goods, entrusted to him for sale, on the ground that the owner of the goods had committed an act of bankruptcy upon which an order in bankruptcy might be made against him. The owner of the goods sued the solicitor for libel. The court
E held that the letter was written on an occasion of privilege since the solicitor was acting in the ordinary course of his duty to his client and the occasion would have been privileged had the client himself written the letter.

[38] In David Price LLB's book titled *Defamation Law, Procedure & Practice* published by Sweet & Maxwell, 1997, at p. 88 on the sub-topic
F of Self-Protection, (reply to an attack), it states:

Where a person's reputation or (his property) has been "attacked" he may defend himself with defamatory statements about his accuser and where relevant also about third parties. The privilege also extends to
G statements made by persons who are agents, relatives or close associates of the person who has been attacked. It is therefore an important category of privilege. In order to take advantage of the defence, it is necessary to show that the contents of the reply have some relevance to the attack and its circulation is proportionate to the
H attack.

[39] Further at p. 89, the writer refers to the case of *Watts v. Times Newspapers Ltd* [1996] 2 WLR 427 and state:

In *Watts v. Times Newspapers Ltd,* an article in the Sunday Times was
I published by the defendants which accused the plaintiff of plagiarism, but which was mistakenly illustrated with a photograph of W, who shares the same name as the plaintiff. W claimed that in consequence, many people would have understood the accusation to refer to him.

With the authorization of W's solicitors, the defendants published a correction and apology in The Sunday Times which, in order to explain how the error was made, repeated the allegation of plagiarism against the plaintiff. The plaintiff sued over the original article and also the correction. The Sunday Times claimed qualified privilege for the correction and joined W's solicitors as third parties since they had authorised the publication of the correction. It was held that W (and therefore his solicitors) was protected by qualified privilege in relation to the correction because he was in effect replying to an attack on him (i.e. the allegation of plagiarism) even though it was not the plaintiff who was responsible for the attack.

[40] Further at p. 90, the writer further opines that:

Counter attacks on the character of the accuser, e.g. he is a liar, are often a highly relevant part of response in order to demonstrate why the attack should not believed.

The principle also applies to a reply to a demand. Where proceedings are threatened against a person unless he complies with a demand, for example, to pay damages of legal costs, he has a legitimate interest in stating his reasons for refusing to do so.

[41] As stated earlier, P3 (letter dated 22 November 2007) by the defendant was written in reply to P1 (letter dated 13 January 2007) by Mr Atma Singh Veriah who in his letter made serious allegations or attacked Madam Lee Fong Ling of committing fraud and misconduct. SP1, Mr ST Lee, agreed that P3 was in reply to P1 during cross-examination. Madam Lee Fong Ling in her testimony affirmed that P3 was written upon her instruction and authority and her testimony was not challenged. The letter, P1 dated 13 November 2007, is produced below.

Atma Singh Veriah & Co.,
Peguambela Dan Peguamcara
Advocates & Solicitors

Atma Singh Veriah Barrister-At-Law,
Lincoln's Inn
Devahi Rosalind John L.L.B.
(HONS) (S'pore)

Unit No. C-12-3, 12th Floor
Megan Avenue II,
No. 12, Jalan Yap Kwan Seng,
50450 Kuala Lumpur.
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FAX: 603 2166 9295
Close on Saturdays

In reply please quote our reference

Your Ref:

Our Ref: ASV/kas/6943/2007 13th November, 2007

A Madam Lee Fong Ling
c/o: FL Lee & Co.
Advocates & Solicitors
Unit No. 568-8-40,
Kompleks Mutiara, No. 568,
3 1/2 Miles, Jalan Ipoh,
B 51200 Kuala Lumpur. Fax No: 03-62577221/A.R. Registered

Dear Madam,

RE: Tenancy Agreement dated 1st May, 2001
Made between Lee Shin Kuang @ Lee Sen Bin with
C Harian Shoes Sdn Bhd for
Premises No. 501, Jalan Tuanku Abdul Rahman, Kuala Lumpur.

We act for Lee Thye @ Lee Shan Too who is the registered co-owner of 1/3 undivided share of the above property held under Geran No. 29700, Lot 544, Seksyen 0041, Bandar Kuala Lumpur with a
D shop premises erected thereon and with a postal address known as No. 501, Jalan Tuanku Abdul Rahman, Kuala Lumpur.

1. We are instructed to write to you as follows:

   (i) that you were acting as the solicitor for Lee Shin Kuang @ Lee Sen Bin in a tenancy agreement dated 1st May, 2001;
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   (ii) that the preamble 2 in the aforesaid agreement that states "The landlord has represented that the 2 legal owners have authorized him to handle all matters and transactions with regard to the premises including the letter out of the
F premises;

   (iii) that in clause 7 under authority to let it was stated "the Landlord warrants that he has been duly authorized and has full power to let out the premises to the tenant and execute this agrees to indemnify the tenant in the event of any loss or damages arising out of any claims by the other legal
G owners of the property."

2. Being the solicitor representing Lee Shin Kuang @ Lee Sen Bin as the landlord, have you obtained any specific authority from our client and the other co-owner Lee Shuan Chan? Can you show the authority (if any);
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3. Have you ever informed our client and the other co-owner that an agreement was signed by Lee Shin Kuang @ Lee Sen Bin with the tenant;

4. Did you give any stamped copy of the tenancy agreement to our
I client, if any? If not, why not?

5. We are informed that Lee Shin Kuang @ Lee Sen Bin is your father. Being a solicitor you have misrepresented the facts to the tenant and colluded with your father to defraud our client;

6. Our client has been informed that Lee Shin Kuang @ Lee Sen Bin has collected from the tenant a sum of RM912,000.00 from the tenant from 1st May, 2001 to 31st August, 2007 as rental.

In view of the above, we are instructed by our client to instruct you to show to our client the authority OR to give a satisfactory explanation within seven (7) days from the date hereof, failing which our client will lodge a complaints to the Bar Council on your misconduct.

Yours faithfully,

Atma Singh Veriah & Co
…

c.c.: Client C.O.P

[42] In P1, at para. 5 and 6 of the letter, the plaintiff through his solicitor Mr Atma Singh Veriah alleged that Madam Lee Fong Ling as a solicitor has misrepresented the facts to the tenant and colluded with her father Mr Lee Shin Kuang to defraud the plaintiff. Thus the offensive stance was started by the plaintiff himself through his counsel/ solicitor Mr Atma Singh Veriah who alleged SD2, Madam Lee Fong Ling of committing fraud and misconduct and threatened to report her to the Bar Counsel.

[43] The defendant, as Madam Lee Fong Ling's, SD2's, solicitor had the legal duty to carry out the instruction of SD2 and he wrote the letters P2 and P3 to the plaintiff's solicitor in response to the serious allegations or attack against SD2. The letters P2, dated 16 November 2007 and P3 dated 22 November 2007 are produced below:

SIEW
Advocates & Solicitors/Peguambela & Peguamcara
No. 49, Jalan Muhibbah 1, Taman Muhibbah, 43950 Sungai Pelek,
Selangor Darul Ehsan.
Tel: 012-6311890; 03-76255539 Fax: 03-76255529;
Email: advocatesiew@time.net.my

Daniel Y.L. Siew
Advocate & Solicitor

Your Ref : ASV/kas/6943/2007
Our Ref : S/G/07
Date : 16th November 2007

A Messrs Atma Singh Veriah & Co.
Advocates & Solicitors
Unit No. C-12-3, 12th Floor,
Megan Avenue II,
No. 12, Jalan Yap Kwan Seng,
50450 Kuala Lumpur.

B Fax/Post

Dear Sir,

Re: Allegation Of Misconduct Against Solicitor

C We act for Madam Lee Fong Ling.

We are taking our client's instructions regarding the allegation stated in your letter dated 13th November 2007.

We shall reply to you on/before 23rd November 2007, Friday.

D Thank you.

Yours faithfully,

t.t.

E …

Messrs. Siew

SIEW
Advocates & Solicitors/Peguambela & Peguamcara
No. 49, Jalan Muhibbah 1, Taman Muhibbah, 43950 Sungai Pelek,
F Selangor Darul Ehsan.
Tel: 012-6311890; 03-76255539 Fax: 03-76255529;
Email: advocatesiew@time.net.my

Daniel Y.L. Siew
Advocate & Solicitor

G

Your Ref : ASV/kas/6943/2007
Our Ref : S/G/07
Date : 22nd November 2007

Messrs Atma Singh Veriah & Co.
H Advocates & Solicitors
Unit No. C-12-3, 12th Floor,
Megan Avenue II,
No. 12, Jalan Yap Kwan Seng,
50450 Kuala Lumpur.

I Fax/Post

Dear Sirs,

Re: Allegation Of Misconduct Against Solicitor

We refer to our letter dated 16th November 2007.

We are instructed to reply to your letter dated 13th November 2007.

Our client had the authority from your client, of whom the paternal uncle of our client and the brother of Lee Shin Kuang @ Lee Sen Bin, our client's father.

At all material time, your client had knowledge of the tenancy agreement dated 1st May 2001 and your client had authorized Lee Shin Kuang @ Lee Sen Bin to handle all matters and transactions with regards to the premises, including the letting.

Therefore, we do not wish to reply to each of the annoying interrogation stated in your said letter in this reply.

It would be sufficient if the said allegations of misrepresentation, fraud and/or misconduct are denied, which we hereby do, on behalf of our client.

Further, your client's freshly concocted allegations of misrepresentation, fraud and/or misconduct against our client is a knee-jerk reaction towards a civil claim and/or demand and/or complaint by the said Lee Shin Kuang @ Lee Sen Bin (our client's father) against your client for breach of trusts and/or fraud and/or misconduct, the facts of which are all well within your client's knowledge.

Our client notes that your client takes position that he shall lodge a complaint to the Bar Council on the alleged misconduct. We are instructed to state that in such event, our client shall defend herself against your client's baseless allegations and your client is exposing himself to a defamatory action thereafter.

Your faithfully,

t. t.

Messrs. Siew

[44] Thus it can be seen that Madam Lee Fong Ling, SD2's, reputation was attacked by the plaintiff through his solicitor Mr Atma Singh Veriah alleging that she had misconduct herself and colluded with her father to commit fraud against the plaintiff. In that circumstances, she responded in self-defence by instructing her solicitor, the defendant, to reply to the attack made against her character; in other words to counter-attack her accuser and in so doing used defamatory words. Her

A action, I feel, is legitimate and proportionate to the attack. The plaintiff accused her of misconduct and collusion to commit fraud with her father against him and warning to report the matter to the Bar Council and she retaliated by accusing the plaintiff of misconduct, fraud and breach of trust.

B

[45] Thus the defendant has successfully proven that he was under a legal duty to comply with the instruction of his client to write P3 to the plaintiff's solicitor to dispute the plaintiffs serious allegations and as such the occasion is protected under the defence of qualified privilege based on a solicitor-client relationship.

C

Plaintiff To Prove Malice If Defendant Has Proven Qualified Privilege

[46] SP1, Mr ST Lee agreed that P3 was in reply to P1 during cross-examination. Thus the testimony of Madam Lee Fong Ling, (SD2), which said that the defendant, SD1, wrote the letter P3 upon her instruction and authority is not challenged.

D

[47] If a judge ruled that an occasion is privileged, then the burden is shifted to the plaintiff to prove that the defendant is not using the occasion honestly but was actuated by malice. The onus is thus on the plaintiff to prove malice.

E

[48] In the case of *Hoe Thean Sun & Anor v. Lim Tee Keng* [1999] 1 CLJ 187; [1999] 3 MLJ 138, it was held that:

> (1) ... However, when the publication takes place under circumstances which create qualified privilege, the presumption of malice is rebutted by the privilege and the plaintiff has to prove express or actual malice on the part of the person responsible for the publication.
>
> (2) The onus lies on the plaintiff to prove malice and not the defendant to prove his *bona fides* or absence of malice. When the occasion is privileged, the *bona fides* of the defendant is always presumed.

F

G

[49] Plaintiff has failed to prove that the defendant was actuated by malice when he wrote the letter P3 in reply to plaintiff's letter P1 upon instruction by SD2. It is not incumbent upon the defendant to prove that he wrote the letter *bona fide* or in the absence of malice. When an occasion is privileged, the *bona fide* of the defendant is always presumed.

H

[50] During the course of trial, no evidence was advanced by the plaintiff to show malice on the part of the defendant in writing the letter, P3. In fact the defendant and plaintiff did not know each other when P1 and P3 were written. They only knew each other after the

I

plaintiff commenced this suit against the defendant. This was confirmed by both the plaintiff, SP1, and the defendant, SD1. (Refer to the case of *Kian Lup Construction v. HongKong Bank Malaysia Bhd* [2002] 7 CLJ 32.

Conclusion

[51] Words in P3 are defamatory and it refers to the plaintiff and was published. However the defendant succeeded in proving that P3 was written in reply or in response to the plaintiff's letter, P1, which attacked and made serious allegations against the defendant's client, Madam Lee Fong Ling (SD2), alleging that she misconduct herself and had colluded with her father to defraud the plaintiff. In those circumstances, Madam Lee Fong Ling, through her solicitor, the defendant, is justified to use defamatory words. Her counter-attack against the plaintiff in P3, her accuser, to defend herself, is proportionate to the serious allegations or attack made against her character as an advocate and solicitor of the High Court of Malaya. P3 was written upon instruction of Madam Lee Fong Ling, SD2, and with SD2's approval and it was not actuated by malice since the defendant did not know the plaintiff until the suit was filed in court. Thus P3 was written by the defendant on an occasion of qualified privilege based on a solicitor-client relationship, whereby as an advocate and solicitor, the defendant was under a legal duty to write P3 upon his client's instruction.

[52] Therefore the defendant had succeeded in raising the defence of qualified privilege. As such the plaintiffs claim is dismissed.

Costs

[53] Mr Vernon Samuel who mentioned on behalf of Miss Audrey Quah for the defendant, prayed for RM30,000 as costs and Mr Wong Yuen Hock for the plaintiff prayed that no costs be ordered by this court. Since the plaintiff and the defendant's client, Madame Lee Fong Ling, SD2, are related; Madam Lee is the plaintiff's niece and the case arose from a family misunderstanding or dispute, I feel costs should be minimal so as not to deter the possibility of the parties getting back together, as a family should. Thus in the circumstances, I feel RM5,000 as costs is adequate.

Plaintiffs claim is dismissed with costs of RM5,000.